SUPREME COURT, U. S.

APR 26 1960

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

GEORGE SEFERI, ET AL,

Appellants

vs.

HOWARD S. IVES,
STATE HIGHWAY COMMISSIONER.

Appellee

No. 1241

On Appeal from The Supreme Court
of the State of Connecticut

MOTION TO DISMISS OF APPELLEE.

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I.

MOTION TO DISMISS.

The appellee respectfully moves that this appeal be dismissed for the following reasons:

1. The federal question sought to be reviewed was not properly raised by these appellants in the presentation of their defense to the appeal in the Supreme Court of the State of Connecticut and was not expressly passed on at that time by said Court.

2. This appeal does not present a substantial federal question.

3. The question of compensation to the owner for the value of a business destroyed as a result of a condemnation has been expressly decided by the Supreme Court of the United States.

I.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT PROPERLY RAISED OR EXPRESSLY PASSED ON.

The appellants contend that the Fifth and Fourteenth Amendments to the Constitution of the United States require the State of Connecticut to pay to the owner the value of a business destroyed as a result of a condemnation. It is significant, however, that nowhere in their brief filed in the subject appeal to the Supreme Court of the State of Connecticut, did the appellants expressly set forth and brief this argument now being alleged as the basis of their federal question presented to the Supreme Court of the United States. It is in the last paragraph of the Conclusion set forth in the appellants brief that the solitary invocation is made of the provisions of the Fifth Amendment to the United States Constitution. (Brief p. 14 to Supreme Court of Connecticut, reprinted on p. 7 of appellants' jurisdictional statement.)

After the oral arguments were fully heard by the Supreme Court of Connecticut, and the decision of that court was announced, these appellants, thereafter, filed their Motion to Reargue. (Appendix C of Appellants' Jurisdictional Statement). An examination of the Motion indicates that at this point these appellants had decided to seek the opportunity to argue the federal issues, as therein presented, which they failed to include in their brief. Since the Motion to Reargue introduced the federal question for the first time, the Supreme Court of Connecticut was not bound to consider it. Our state Supreme Court has repeatedly stated that claims of error not pursued in a brief are considered abandoned and will not be decided. *Monahan v. Montgomery*, 153 Conn. 386, 389; *Canterbury Realty Co. v. Ives*, 153 Conn. 377, 380; *William Peck Lumber Co. v. Virnides, Inc.*, 153 Conn. 710, 712. And most recently, in *Frederick W. Wood, et al v. Town*

of Wilton, 29 Conn. L.J. No. 42, p. 18. It was incumbent upon these appellants to properly brief the support of their argument by timely presentation of same to that court in order to receive its consideration. Furthermore, since the federal question presented in this appeal was not briefed by either party, the Supreme Court of Connecticut did not expressly pass on it.

II.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The appellants' claim that the questions presented are substantial finds no support in the vast majority of the court decisions and opinions of recognized authorities which have considered the question of damages to business or loss of goodwill resulting from condemnation of land by a sovereign. Not all elements of damages in a condemnation of land by the sovereign are constitutionally compensable. In *United States v. General Motors Corp.* 323 U.S. 373, 382, the Supreme Court of the United States ruled as follows:

> "The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. . . . No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government. (cases

cited). We are not to be taken as departing from the rule they have laid down, which we think sound. . . ."

And on page 382, the Supreme Court stated further:

". . . Whatever of property the citizen has the Government may take. When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these, whatever remedy may exist lies with Congress."

This decision sets forth the rule which applies to the issues claimed by these appellants.

In an earlier case, *Mitchell v. United States,* 267 U.S. 341, 45 S. Ct. 293, 69 L. Ed. 644, the government condemned land as a proving ground for military purposes. The plaintiffs had used their land in the business of growing and canning corn of a special grade. The establishment of the proving ground resulted in withdrawing the available lands adapted to growing the particular quality of corn so that the plaintiffs could not reestablish their business elsewhere. The plaintiff received compensation for the land and improvements but no allowance was made for the loss of the business. This denial of recovery was upheld by the Supreme Court, Brandeis, J. saying:

"There is no finding as a fact that the government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land. There can be no recovery under the Tucker Act if the intention to take is lacking."

Our case is not the same as an intentional acquisition of a business by a condemnor. In *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 69 Sup. Ct. 1434, 93 L. Ed. 1765, 7 ALR 2d 1280, the United States Government acquired the petitioner's laundry plant which it continued to operate as a laundry for army personnel using most of the petitioner's 180 employees. Condemnation petition was filed on November 21, 1942 for a period expiring June 30, 1943, to be extended from year to year at the election of the Secretary of War. The property was finally returned to its owner on March 23, 1946. The petitioner sought damages for destruction of its "trade routes". The Supreme Court decided that the petitioner was to be paid for the destruction of its trade routes. However, the Court distinguished this case from the usual cases in which such compensation has been denied, that is, cases where only the physical property was condemned, leaving the owner free to move his business to a new location, e.g. *Bothwell v. U.S.*, 254 U.S. 231, 65 L. Ed. 238, 41 Supreme Court 74.

> "In such a situation there is no more reason for a taker to pay for the business going-concern value than there would be for a purchaser to pay for it who had not secured from his vendor a covenant to refrain from entering into competition with him. It is true that there may be loss to the owner because of the difficulty of finding other premises suitably situated for the transfer of his good will, and that such loss. . . . is denied compensation as consequential. See *Joslin Mfg. Co. v. Providence*, 262 U.S. 668, 676, 67 L. Ed. 1167, 1174, 43 Supreme Court 684. . . . When a condemnor has taken fee title to business property, there is reason for saying that the compensation due should not vary with the owner's good fortune or lack of it in finding premises suitable for the transference of going concern value. In the usual case most of it can be transferred; in the remainder the amount of loss is so speculative that proof of it may jus-

tifiably be excluded. By an extension of that reasoning the same result has been reached even upon the assumption that no other premises whatever were available. *Mitchell v. U.S.*, 267 U.S. 341, 69 L. Ed. 644, 455 Conn. 293." *Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 11-12.

All of the recognized authorities do not support the appellant's claim.

In this respect Orgel, in Vol. 1 (1953 edition) Section 78, pages 334-335 states the following regarding compensation for loss of business:

> ". . . the 'taken or damaged' clause in the state constitutions has uniformly been construed to give the owner no claim which he would not possess under a mere 'taken' clause. Even under the broader clause, the distinction is universally drawn between compensation for damage to *property* and compensation for damage to *business*. While the courts differ as to the extent to which the "damaged" clause requires compensation for 'consequential damages' to property, they are all agreed that it does not extend to damages to business. The compensation awarded under the 'taken or damaged' clause is almost without exception recovered in terms of depreciation in market value and the adherence to this standard necessarily excludes the independent consideration of damages expressed . . ., in terms of financial outlays imposed on an owner or in terms of lost opportunity to secure an income."

Orgel again states in Vol. 1, Sec. 75, pages 325-326:

> "There has been general agreement in the American cases that the owner may not receive compensation for loss of good will apart from the market value of the land taken even though there is no doubt that the good will

> has been substantially damaged. . . . we find the courts giving two principal reasons for this rule. One is that the law requires compensation for damage to property but not to business since it is the real property but not the business that is taken. The other reason is that loss of good will is too speculative to be considered."

In his summary, Orgel ibid, S 78 pp. 333-334 sets forth the following as a possible explanation why the courts almost uniformly refuse to give recovery for loss of business or goodwill:

> ". . . Sometimes, the courts mean, as in the case of loss of good will, that it is difficult to affirm positively that any loss will result from the taking. At other times, the courts mean that pecuniary extent of the loss cannot be accurately determined. But it seems plausible that the underlying basis of this argument is the feeling that to permit recovery for these losses would make it impossible to estimate in advance the probable cost of the property appropriated and would thus deter or discourage public improvements. The denial of compensation and the strict adherence to the market value standard in these cases is thus seen to be a mode of compromising or adjusting the conflict between the community's interest in public improvements and the principle of complete indemnity to the owner."

Our argument is further supported by another eminent authority. Nichols on Eminent Domain, Vol. 4, Third Edition, § 13.3 et seq. states as follows:

> "An established business or what is called 'good will' has never been held to be by itself property in the constitutional sense. When a piece of real estate upon which an established business is carried on is taken for the public

use, it often happens that the proprietor of the business is unable to secure an equally available site in the neighborhood. By the interruption of his business and the removal thereof to a considerable distance away, he may lose the greater part of his customers and never be able to regain his standing in the business community. If he is the owner of the land taken the jury may partly compensate him by giving him a liberal award for the land, but if he is a mere tenant, especially if there is an eminent domain clause in his lease, he may not receive a dollar.

While it may be an added element of value to a particular piece of land taken, a business is less tangible in nature and more uncertain in its vicissitudes than the rights which the constitution undertakes to protect absolutely. Although in some cases the destruction of an established business works a much greater hardship than many injuries for which the constitution makes compensation necessary, the diminution of its value is considered a vaguer injury than the type of taking or appropriation with which the constitution deals. A business might be destroyed by the construction of a more popular street into which travel was diverted or by a change in the location of a railroad station, a subway entrance, or even a transfer point for street cars, as well as by competition, but there would be as little claim in the one case as in the other.

The case is no different when the business is destroyed by the taking of land on which it was conducted. It is well settled that when land occupied for business purposes is taken by eminent domain, the owner or occupant is not entitled to recover compensation for the destruction of

his business or the injury thereto by its necessary removal from its established location. Furthermore, as the business is something entirely distinct from the market value of the land upon which it is conducted, it is not considered in determining the value of such land except so far as it illustrates one of the uses to which the land taken may be put. The reasons for this rule are doubtless sound. Any modification of this rule might lead to countless claims for damages, some fraudulent and all difficult to appraise fairly. But unquestionably the rule sometimes works great hardship."

In conclusion we may add that the value of a business and the profits derived therefrom may and often are the result of a combination of factors and circumstances other than the location of the land upon which the business is conducted. The financial success and stability of the business, in most instances, reflects the degree of acumen, integrity and even personality of the operator; such personal attributes create a greater portion of the value of the business than is created by the location of the premises upon which the business is operated. Furthermore, the state as condemnor has not "taken" the business operator's ingenuity and business acumen or deprived him of his ability to engage in a business at any other location not taken by the State. Therefore, the State should not be required to pay for anything other than the real property actually taken. In this respect, it is important to note that the State Highway Commissioner is empowered by Statute to take only land. Section 13a-73b, Connecticut General Statutes. (Appendix A). It is an undisputed fact in our case that pursuant to such authority limited to the acquisition of land the highway commissioner took land only and did not take nor did he intend to acquire the retail business owned and conducted thereon by these appellants.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the appeal of these appellants to the United States Supreme Court be dismissed and that this Motion to Dismiss be granted.

Respectfully submitted,

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APPENDIX A

SECTION 13a-73b, CONNECTICUT GENERAL STATUTES.

(b) CONDEMNATION. The commissioner may take any land he finds necessary for the layout, alteration, extension, widening, change of grade or improvement of any state highway and the owner of such land shall be paid by the state for all damages and the state shall receive from such owner the amount or value of all benefits resulting from such taking, layout, alteration, extension, widening, change of grade or other improvement. The assessment of such damages and of such benefits shall be made by the commissioner and filed by him with the clerk of the superior court in the county in which the land affected is located, and such clerk shall give notice of such assessment to each owner of land affected thereby by mailing to each a copy of the same, postage prepaid, and, at any time after such assessment has been made by said commissioner, the physical construction of such layout, alteration, extension, widening, change of grade or other improvement may be made. (February, 1965, P.A. 309, S 1).